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# Aspects of the Minnesota Rule Prohibiting Discovery of Work-Product and Expert Conclusions

*Minnesota Rule of Civil Procedure 26.02 expressly prohibits any pretrial discovery of either an attorney's written work-product or an expert's conclusions; non-written work-product as well as facts observed by an expert, however, are not covered. The author of this Note compares the Minnesota prohibitions with the federal, judicially created limitations on discovery in light of the policies that underlie both. He concludes that the prohibition of Minnesota Rule 26.02 should only be applied to those areas definitely coming within its language, but that a more flexible limitation, patterned after the federal rule, might be applied to areas not expressly covered by Rule 26.02.*

## I. INTRODUCTION

Under the common-law procedural system there was no right to inspect relevant documents of an adversary prior to trial.<sup>1</sup> The advent of an effective pretrial discovery mechanism was, therefore, regarded as one of the foremost innovations of the procedural system embodied in the Federal Rules of Civil Procedure.<sup>2</sup> Although all nonprivileged facts relevant to impending litigation were to be revealed to all interested parties,<sup>3</sup> production of documents prepared by attorneys in anticipation of trial that reflected legal theories or mental processes was often not compelled.<sup>4</sup> The

1. Discovery was, however, available in equity proceedings. See MILLAR, *THE OLD REGIME AND THE NEW IN CIVIL PROCEDURE* 36-39 (1937).

2. See generally Pike, *The New Federal Deposition-Discovery Procedure and the Rules of Evidence*, 34 ILL. L. REV. 1 (1940); Pike & Willis, *The New Federal Deposition-Discovery Procedure* (pt. I), 38 COLUM. L. REV. 1179 (1938); Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 86 MICH. L. REV. 215 (1937).

3. Not all facts can be discovered, however, even under the federal rules. For example, confidential business information was held nondiscoverable in *Shawmut, Inc. v. American Viscose Corp.*, 11 F.R.D. 562 (S.D.N.Y. 1951). But cf. *Seff v. General Outdoor Advertising Co.* 11 F.R.D. 597 (N.D. Ohio 1951).

4. See, e.g., *Condry v. Buckeye S.S. Co.*, 4 F.R.D. 310 (W.D. Pa. 1945); *Creden v. Central R.R.*, 1 F.R.D. 168 (E.D.N.Y. 1940); cf. *Walling v. Richmond Screw Anchor Co.*, 4 F.R.D. 265 (E.D.N.Y. 1948).

United States Supreme Court, in *Hickman v. Taylor*,<sup>5</sup> referred to these documents as an attorney's "work-product" and suggested that the basis for limiting their discovery was the promotion of the adversary system. Similar restrictions have been placed by the federal courts on discovery of the findings or conclusions of an adversary's expert.<sup>6</sup> Both the expert exemption and the work-product rule represent potentially severe limitations on discovery.

The scope of discovery of both attorney work-product and expert conclusions has been restricted in Minnesota by explicit statutory provision rather than by judicial creation. Rule 26.02 of the Minnesota Rules of Civil Procedure provides that the production for discovery of any "writing obtained or prepared . . . in anticipation of litigation or in preparation for trial, or of any writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or . . . the conclusions of an expert, shall not be required."<sup>7</sup> This provision, in contrast to the federal *Hickman* rule, precludes discovery of an attorney's written work-product and conclusions of an expert without regard to good cause.<sup>8</sup> Further, Rule 26.02 extends beyond *Hickman* by expressly providing not only against discovery of an attorney's writings, but also against those prepared by the party or his surety, indemnitor, or agent in anticipation of litigation.<sup>9</sup> Although the Minnesota provision apparently was intended to have placed broader re-

5. 329 U.S. 495 (1947).

6. See, e.g., *E. I. duPont de Nemours & Co. v. Phillips Petroleum Co.*, 23 F.R.D. 237, 239 (D. Del. 1959) (deposition seeking information contained in calculations, test data, charts and spectra performed by technicians under counsel's direction disallowed); *United States v. 6.82 Acres of Land, More or Less*, 18 F.R.D. 195 (D.N.M. 1955) (prepared reports and documents containing the opinions of expert appraisers not compelled under Federal Rule 34).

7. MINN. R. CIV. P. 26.02. The section reads as follows:

Unless otherwise ordered by the court as provided by Rule 30.02 or 30.04, the witness may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party . . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. The production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial, or of any writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert, shall not be required.

8. See note 19 *infra*.

9. The federal rule, although not extending to all the categories covered by Rule 26.02, is not confined solely to work done by the attorney. See Allt-

strictions on discovery of written work-product than the federal limitation,<sup>10</sup> the exact relationship between the federal—the *Hickman*—rule and Minnesota Rule 26.02 is largely unanswered. This Note will first examine the rationale underlying the limitations on discovery and then explore the possible applicability of a *Hickman*-type rule in Minnesota under certain circumstances with respect to both attorney's work-product and expert's conclusions.

## II. THE UNDERLYING RATIONALE

The federal limitation on discovery of an attorney's work-product, which is apparently inconsistent with the policy of favoring maximum discovery, was at first justified on the ground that the inquiry would not produce admissible evidence.<sup>11</sup> Although discovery techniques must appear "reasonably calculated to lead to the discovery of admissible evidence,"<sup>12</sup> there is no requirement that any evidence actually be produced or that the information produced be admissible; the determinative limitations are only that the inquiry be both relevant and restricted to nonprivileged information.<sup>13</sup> Federal courts consequently precluded discovery aimed at relevant, nonprivileged work-product on the ground that it fell within the attorney-client privilege.<sup>14</sup> Not all docu-

mont v. United States, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950). For a discussion of the *Hickman* rule, see Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498, 508-09 (1958); 41 MINN. L. REV. 823 (1957).

10. Initially, MINN. R. CIV. P. 30.02 was to be revised by an insertion of a provision protecting against undue expense and directing the court to liberally exercise its power to protect the parties and witnesses. Rule 26.02, in the meantime, was to be revised by requiring that the "examining party may not inquire as to contents or substance of statements obtained from prospective witnesses by or on behalf of another party." 2 YOUNGQUIST & BLACK, MINNESOTA RULES PRACTICE (Supp. 1962, at 8). This suggestion was deemed unsatisfactory and Rules 26.02 and 30.02 were later amended to their present language. The broadly phrased suggestion reflected an absolute immunity, but did not distinguish between experts and other witnesses or express the present concern with written statements or the "anticipation of litigation or preparation for trial" requirement. It does, however, reflect the complementary interaction between Rules 30.02 and 26.02.

11. See, e.g., *In re Citizens Cas. Co.*, 3 F.R.D. 171 (S.D.N.Y. 1942); *Popino v. Jones Store Co.*, 1 F.R.D. 215 (W.D. Mo. 1940); cf. *Kenealy v. Texas Co.*, 29 F. Supp. 502 (S.D.N.Y. 1939).

12. FED. R. CIV. P. 26(b); see MINN. R. CIV. P. 26.02.

13. *Ibid.*; see *Curtis v. Loew's Inc.*, 20 F.R.D. 444 (D.N.J. 1957).

14. See *Hickman v. Taylor*, 153 F.2d 212, 222-23 (3d Cir. 1945). But cf. *Dugger v. Baltimore & O.R.R.*, 5 F.R.D. 334 (E.D.N.Y. 1946).

ments prepared for trial, however, can properly be considered communications between attorney and client.<sup>15</sup> Also, a privilege, unless waived, carries over into trial, but an exemption from discovery applies only to pretrial activities.

While rejecting the previous attempts to justify the limitation,<sup>16</sup> *Hickman v. Taylor*<sup>17</sup> nonetheless held that materials constituting an attorney's "work-product" are protected from discovery,<sup>18</sup> except that a party can compel production of an adversary's work-product if he can demonstrate "good cause."<sup>19</sup> Yet the underlying rationale of the *Hickman* case has remained uncertain. Relying on the language concerning the protection of the privacy of an attorney's theories and possible legal contentions, some federal courts have invoked *Hickman* mainly to protect trial strategy or, more vaguely, the attorney's "mental processes."<sup>20</sup> Although this rationale might explain cases exempting from discovery certain material that reflects an attorney's thoughts or strategy,<sup>21</sup> it does not explain other cases exempting

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15. This distinction was clearly elicited in *Hickman*. 329 U.S. at 508; cf. *Sheperd v. Castle*, 20 F.R.D. 184 (W.D. Mo. 1957).

16. 329 U.S. at 508-09.

17. Although the opposing attorneys assumed that the question arose under Federal Rules 33 and 34, the Court in *Hickman* properly found that Federal Rule 26 was in question. 329 U.S. at 501-06.

18. *Hickman* involved a suit against certain tugboat owners in a federal court to recover for the death of a seaman. The defendants were asked to set forth the exact provisions of any oral statements or reports taken of witnesses in detail and to produce copies of all written statements procured. The defendants and their counsel refused on the ground that this material was work-product and, therefore, immune from discovery.

19. Good cause is actually a showing of "need" arising because the information is probably unavailable from any other source. It is not the same as good cause under Federal Rule 34 where convenience is the determinative test; federal courts are satisfied under Rule 34 where production will enable a party adequately to prepare his case. See, e.g., *United States v. 48 Jars, More or Less*, 23 F.R.D. 192 (D.D.C. 1958); *Naylor v. Isthmian S.S. Co.*, 10 F.R.D. 128 (S.D.N.Y. 1950). See also 2A BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 652.4 (Rules ed. 1961).

20. See, e.g., *Guilford Nat'l Bank v. Southern Ry.*, 24 F.R.D. 493, 499 (M.D.N.C. 1960); Note, 62 HARV. L. REV. 269, 270 (1948).

21. See Note, 62 HARV. L. REV. 269, 270 (1948). See also Louisell, *Discovery and Pre-Trial Under the Minnesota Rules*, 36 MINN. L. REV. 633, 638 (1952):

The Federal Advisory Committee's proposal for a solution of the problem of *Hickman v. Taylor* drew a clearcut distinction between those parts of writings prepared for litigation which *do*, and those which *do not*, reflect an attorney's "mental impressions, conclusions, opinions, or legal theories." The former *always* were to be exempt from discovery;

material having little or no connection with those factors.<sup>22</sup>

A less restricted and more proper theory is based on the language in *Hickman* reciting the desirability of promoting the efficacy of the adversary system.<sup>23</sup> Although protection of an attorney's work-product and the goal of avoiding "trial by surprise" are apparently inconsistent, reconciliation is effected on the ground of promotion of the adversary system. Further, if the protection of trial strategy or the privacy of the attorney's files were the underlying rationale, the good cause exception of *Hickman* would be anomalous; if, instead, the basis of the federal work-product rule is the promotion of the adversary system, the good cause exception is not inconsistent. Indeed, this exception serves to promote an efficient adversary system by providing an opportunity for full preparation of a case by both counsel where discoverable information has become otherwise unavailable. This latter rationale, therefore, is preferable and should control the scope of protection offered by any rule prohibiting discovery.

Some federal courts have improperly equated experts' conclusions with those of an attorney and have therefore held that an expert's reports are protected as a part of "work-product."<sup>24</sup> An expert's conclusions, however, should probably be immune from discovery in their own right. In so finding, a California court relied on the attorney-client privilege,<sup>25</sup> while many courts, both

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the latter were to be exempt *unless* considerations of fairness, hardship or justice required discovery.

22. See, e.g., *Snyder v. United States*, 20 F.R.D. 7 (E.D.N.Y. 1956) (information of such a highly technical nature that it could not reflect counsel's mental processes).

23. 329 U.S. at 516: "But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." See *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1028 (1961), which suggests that this broader basis has not yet been fully articulated in the lower courts.

24. See *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959). But see *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948). One "evil" that *Hickman* attempted to obviate, that the discovery of work-product might make an attorney's conclusions relevant and might force him to take the stand, does not arise here, for the expert is properly a witness. The work-product rule, therefore, is not applicable, and if it were the only argument advanced to justify the expert exemption, it would be correct to allow discovery since the expert's conclusions are evidence and should be revealed.

25. See *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951); cf. *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 684 (D. Mass. 1947).

federal and state, have merely concluded that allowing discovery would be "unfair."<sup>26</sup> To the extent that discovery would be unfair to the expert, the rationale is based on an old proprietary argument: through discovery the interrogating party is taking "property" from the expert without compensation.<sup>27</sup> Although this argument still retains some support,<sup>28</sup> the real unfairness complained of is more properly directed at the party,<sup>29</sup> because discovery penalizes those who have had the foresight to procure expert assistance. More broadly stated, therefore, the unfairness rationale is equivalent to the policy that underlies the work-product rule — protection of expert's conclusions is necessitated by an overriding desire to effect efficient adversary proceedings.<sup>30</sup>

### III. THE MINNESOTA WORK-PRODUCT RULE

The assumption that Minnesota Rule 26.02 places an absolute prohibition on discovery of writings that fall within the language

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26. See, e.g., *Smith v. Hobart Mfg. Co.*, 188 F. Supp. 185 (E.D. Pa. 1960) (information concerning manufacture and design of a meat grinder readily available through sources other than opposing counsel); *Stanton v. Rushmore*, 112 N.J.L. 115, 169 Atl. 721 (1934).

27. See, e.g., *Stanton v. Rushmore*, 112 N.J.L. 115, 169 Atl. 721 (1934); *Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Philadelphia*, 262 Pa. 439, 105 Atl. 630 (1918).

28. See WRIGHT, MINNESOTA RULES 171 (1954), stating that the purpose of the prohibition is to prevent one side from obtaining the advantage of expert testimony without paying for it. See 4 MOORE, FEDERAL PRACTICE ¶ 26.24, at 1528 (2d ed. 1953); Louisell, *supra* note 21, at 639 suggesting that discovery be conditioned on the interrogating party contributing a reasonable share to the cost of procuring the expert and the expert fees. *But see* *Kratzer v. Minneapolis Soc'y of Fine Arts, Inc.*, Civil No. 537424, 4th Jud. Dist., Minn., Nov. 18, 1959, rejecting such an offer to split costs.

29. Cf. Freidenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 482 (1962); Louisell, *supra* note 21.

30. See Freidenthal, *supra* note 29, at 485-86; cf. *E. I. duPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 421 (D. Del. 1959); Comment, 55 NW. U.L. REV. 700 (1961). However, some federal courts have argued in favor of the broad discoverability of expert conclusions on the same basis, finding that knowledge of possible adverse expert testimony is indispensable to adequate preparation for cross-examination and, thereby, essential to an effective adversary proceeding. See *United States v. 48 Jars, More or Less*, 23 F.R.D. 192, 198 (D.D.C. 1958); cf. *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954). This argument is especially compelling only in the rare situation where an expert may distort his opinion testimony to support a particular party or position. In such a case the distorted testimony could not be accurately foreseen, and an effective defense would be unavailable to a party through other competent witnesses. The Wisconsin court has found that the importance of avoiding this possible lapse in the adversary system outweighs any possible "unfairness" to a litigant resulting from the discovery

of the provision is undoubtedly correct;<sup>31</sup> thus, there can be no good cause exception to written work-product in Minnesota. This conclusion is buttressed by the fact that although the proposals of the Federal Rules Advisory Committee apparently served as a guideline for the Minnesota rule,<sup>32</sup> the good cause exception in the proposals was not included in the Minnesota provision; if a good cause exception was intended to be the basis for discovery of written work-product in Minnesota, it probably would have been expressly included. The mandatory language of Rule 26.02, therefore, should not be abrogated by judicial imposition of the *Hickman* good cause test on written work-product.

#### A. NONWRITTEN WORK-PRODUCT

Oral statements, however, taken in anticipation of litigation or reflecting an attorney's mental impressions, conclusions, opinions or legal theories — work-product not specifically mentioned in Rule 26.02 — might not be subject to a total prohibition.<sup>33</sup> The extent of allowable discovery of oral statements could conceivably

of expert conclusions. State *ex rel.* Reynolds v. Circuit Court, 15 Wis. 2d 311, 112 N.W.2d 686 (1961); see Comment, 45 MARQ. L. REV. 600 (1962). The argument, however, ignores the obvious strategy of protecting rebuttal testimony until trial; in fact, rather than eliminating surprise the discoverability of expert conclusions would only shift the advantage of such testimony from one party to the other. Since, therefore, little would be accomplished by allowing such discovery, the policies in favor of nondiscoverability should remain unaffected.

31. See *Brown v. Saint Paul City Ry.*, 241 Minn. 15, 35, 62 N.W.2d 688, 701 (1954). See also Note, 68 HARV. L. REV. 673, 681 (1955).

32. See FEDERAL ADVISORY COMMITTEE, 1946 PROPOSED AMENDMENTS 83 (Rule 30(b)) (1947):

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial *unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice.* The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.

(Emphasis added.) For a discussion of the Advisory Committee's amendment, see Louisell, *supra* note 21, at 636-38; Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026, 1030-31 (1950).

33. See 2 YOUNGQUIST & BLACK, MINNESOTA RULES PRACTICE (Supp. 1962, at 8). It probably does not follow, however, that work-product can be discovered in Minnesota from the attorney on the basis that it is only "fact." See *In re Prudence-Bonds Corp.*, 76 F. Supp. 643 (E.D.N.Y. 1948) (advice and opinion of counsel cannot be discovered as fact).



be governed by either of two alternatives: the absolute prohibition of Rule 26.02 or the *Hickman* rule.<sup>34</sup> Application of the more discretionary *Hickman* rule rather than the unwavering prohibition of Rule 26.02 to oral work-product would permit results more consistent with the general goal of maximizing the availability of relevant factual information without injury to the adversary system through discovery. Any discovery of oral work-product, however, could result in the evils *Hickman* attempted to preclude and culminate in the attorney either being deposed or testifying against his client's interest. Because of these undesirable effects, the production of oral work-product might be compelled very rarely,<sup>35</sup> thus realistically making the good cause exception to a *Hickman*-type rule of nondiscoverability of oral work-product but one step removed from an absolute prohibition.<sup>36</sup> Yet, at least in those cases where justice requires the production of the contents of oral statements, the application of the *Hickman* rule would permit such discovery at the court's discretion.

Whether this protection ought to be extended to those persons other than attorneys enumerated in Rule 26.02,<sup>37</sup> however, is another question. When oral work-product does not involve direct contact with an attorney, the need for protection is not as great. Although there should be some concern for misuse of discovery in these cases, most abuses can be thwarted through the use of Minnesota Rule 30.02. The orders for the protection of parties and witnesses that are available under Rule 30.02 are expressly made applicable to the inquiries allowable under Rule

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34. Discovery of oral work-product without limitation, another obvious alternative, should not be permitted, for this would encourage the very "inefficiency, unfairness and sharp practices" that the Supreme Court in *Hickman* attempted to preclude:

Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 511.

35. The Court in *Hickman* pointed out:

We do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production [of oral statements]. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. . . . The standards of the profession would thereby suffer.

329 U.S. at 512-13.

36. See text accompanying note 7 *supra*.

37. See note 7 *supra*.

26.02. Rule 30.02 states that a court may, on a showing of "good cause," issue an order limiting the scope of the deposition process or "make any other order which justice requires to protect the party or witness from annoyance, expense, embarrassment or oppression."<sup>38</sup> Therefore, any threatened detriment to the adversary system can be checked at the discretion of the court.<sup>39</sup> Since the federal work-product rule does not extend to all persons enumerated in Rule 26.02, a strict imposition of *Hickman* would necessitate the use of Rule 30.02 orders to protect work performed by such persons. An attorney might be examined under a *Hickman*-type rule implied in Minnesota Rule 26.02 only on a showing of good cause by his adversary, while discovery by deposition of a surety, indemnitor or agent would be permissible unless that individual could establish good cause to prohibit discovery. Since protection of the attorney is the main concern, this shift in the burden of persuasion would be desirable.

Another crucial question in determining the scope of the work-product restriction is whether material, neither oral nor written, is subject to discovery where it undeniably reflects both an attorney's "mental processes" and was prepared in anticipation of litigation. Fear has been expressed by members of the Minnesota Bar that "writing" might be defined so broadly that it would prohibit the discovery of materials such as movies and photographs<sup>40</sup> that were previously subject to inspection. Presumably, photographs and movies are mechanical reproductions not sufficiently like a "writing" to be accorded Rule 26.02 protection. If "mental processes" are reflected by them, it is probably only

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38. MINN. R. CIV. P. 30.02 reads as follows:

After notice is served for taking a deposition . . . the court . . . may make an order that the deposition shall not be taken . . . or that certain matters may not be inquired into . . . or that secret processes, developments, or research need not be disclosed . . . or the court may make any other order which justice requires to protect the party or witness from annoyance, expense, embarrassment or oppression. The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.

39. It is worthy of note that the Federal Advisory Committee's proposed amendment to the federal rules was contained as an amendment to Rule 30(b), not Rule 26 (b). See note 32 *supra*.

40. See de Parcq, *The Uniform Rules of Evidence: A Plaintiff's View*, 40 MINN. L. REV. 301, 306-07 (1956). The writer expresses a fear that since UNIFORM RULE OF EVIDENCE 1(13), gives "writing" a sufficiently broad definition to include plats, x-rays and photographs, the same broad definition might be incorporated into Rule 26.02. See *Rybak v. Minnesota Mining & Mfg. Co.*, Minn. Rules Comm'n Op. No. 129. *But see Williams v. Chicago*,

because the photograph was taken in such a way that it conveys an inaccurate representation. Thus, the policy against encouraging "sharp practices" would also favor discoverability. On the other hand, although a tape recorded statement is technically no more a "writing" than a photograph, in those cases where it represents only an alternate means of taking a written statement, it should be protected. If the term "writing" is narrowly construed, the discretion invested in the court by Rule 30.02 will be enhanced, and even a photograph might be protected if the exigencies of a particular fact situation demanded it. Consequently, any mechanistic approach based on the physical characteristics of the desired items should be avoided. Rather, the scope of protection of such items should turn on whether, in the view of the court, protection from discovery would encourage the "sharp practices" condemned in the *Hickman* case or would be detrimental to an effective adversary proceeding in any other fashion.

#### B. JUDICIAL INTERPRETATIONS OF THE MINNESOTA RULE

In *Boldt v. Sanders* the Minnesota Supreme Court impliedly considered whether impeachment material was work-product and therefore outside the scope of discovery.<sup>41</sup> The court held that it was not.<sup>42</sup> Undoubtedly, the policy supporting discovery clearly favors the uncovering of possible impeachment material to facilitate the elimination of that potential element of gamesmanship from the trial.<sup>43</sup> Although the holding in *Boldt* might seem to run afoul of the provisions of Rule 26.02, impeachment material should be excluded from the protection of that rule, for impeachment material by itself is not the kind of "defense" material protected

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G.W. Ry., Minn. Rules Comm'n Op. No. 212, holding that photographs were not "writings" within the meaning of Rule 26.02 and that the defendant did not have to answer interrogatories inquiring about them. This decision seems to be entirely inconsistent with other decisions and to ignore the fact that Rule 26.02 protects only documents and not the information contained within them. Cf. *Atlantic Greyhound Corp. v. Lauritzen*, 182 F.2d 540 (6th Cir. 1950); *Helverson v. J. J. Newberry Co.*, 16 F.R.D. 330 (W.D. Mo. 1954); *Shields v. Sobelman*, 64 F. Supp. 619 (E.D. Pa. 1946).

41. 261 Minn. 160, 111 N.W.2d 225 (1961), 47 MINN. L. REV. 289 (1962).

42. 261 Minn. at 164, 111 N.W.2d at 227-28. The court believed that a refusal to allow discovery would undermine "the whole purpose of the rules of civil procedure" and "would inevitably lead back to the 'poker hand' concept of litigation, rewarding artifice and camouflage," and found, therefore, that the adversary system would be benefited by broad discoverability of impeachment material.

43. See *Coyne v. Monongahela Connecting R.R.*, 24 F.R.D. 357 (W.D. Pa. 1959); Chandler, *Discovery and Pre-Trial Procedure in Federal Courts*, 12 OKLA. L. REV. 321, 324 (1959).

by Rule 26.02.<sup>44</sup> The *Boldt* decision, therefore, merely extends the scope of discovery beyond inquiries designed to lead to evidence;<sup>45</sup> it only allows discovery of impeachment material that is not otherwise protected. As such, the decision is consistent with a policy of enhancing an open, effective adversary proceeding. *Boldt* does not, however, stand for the proposition that a writing, otherwise undiscoverable because of Rule 26.02, is discoverable if it is impeachment material. Clearly, anything that is a "writing" within the meaning of Rule 26.02, including impeachment material, if prepared in anticipation of trial or reflecting an attorney's mental impressions, conclusions, opinions or legal theories is entitled to immunity.<sup>46</sup>

The Minnesota court has also considered whether a statement taken in the usual course of business that serves purposes other than trial preparation is to be protected from discovery. In *Brown v. Saint Paul City Ry*,<sup>47</sup> the court held that unless the material is prepared solely in anticipation of litigation, it is subject to discovery. Since Rule 26.02 explicitly applies to materials prepared not only by an attorney, but by the party, his agent, surety or indemnitor, such materials might conceivably be prepared both as a matter of business policy and in anticipation of litigation. Notwithstanding that these materials might appear to be protected by the language of the rule, they are probably within the "usual course of business" exception and are available for discovery purposes. Thus, in *Brown*, a report prepared pursuant to an established routine was denied the protection of Rule 26.02 because there was no evidence that it was not to be used for purposes other than preparing for litigation. However, proof that a writing was prepared by one of the persons enumerated in Rule 26.02 solely in anticipation of litigation — although perhaps in the usual course of business — might avoid the *Brown* decision and allow such material to remain protected.

The Minnesota work-product rule, then, is not as stringent as it might appear on its face. It does, however, represent a greater intrusion into the policy of maximized discovery than the federal

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44. See defenses enumerated in MINN. R. CIV. P. 8.03.

45. See note 7 *supra*.

46. As previously stated, the question whether or not mental processes are involved should seldom be determinative, but the requirement that the statement be taken in anticipation of litigation is a strictly construed prerequisite to Rule 26.02 protection. Thus, when an attorney's activities are undertaken for the primary purpose of planning future conduct—as is often the case with house counsel—the work is not protected as work-product under Rule 26.02.

47. 241 Minn. 15, 62 N.W.2d 688 (1954).

rule — primarily because of its failure to provide a good cause exception when applied to writings.

#### IV. THE NONDISCOVERABILITY OF THE CONCLUSIONS OF AN EXPERT

The similarity of the expert exemption and the work-product rule in both rationale and result has led to many similar interpretive developments. Thus, the majority of federal courts have allowed discovery of possible adverse expert conclusions on a showing of "good cause."<sup>48</sup> Like the Minnesota rule on work-product, however, Rule 26.02 has expressed an absolute prohibition by providing that except for the findings of a medical examination ordered under Rule 35, "the conclusions of an expert, shall not be required."

##### A. EXTENT OF THE MINNESOTA RULE AND ITS EXCEPTIONS

A distinction has been drawn between "facts" observed by an expert held to be discoverable and "conclusions" resulting from these observations held to be protected.<sup>49</sup> Since Rule 26.02 does not purport to cover "facts," any material that is not a "conclusion" of an expert might be either freely discoverable, absolutely nondiscoverable by the express prohibition of Rule 26.02, or, under the *Hickman* test, discoverable on a showing of good cause. The distinction between conclusions and facts logically results in the rule that whenever an expert witness is called upon to divulge information that could be characterized either as a fact or a conclusion, discovery should be prohibited if the witness is familiar with the material solely because of his expertise. In some respects the whole fact-conclusion distinction is open to doubt, because where factual discovery amounts to discovery of an ultimate con-

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48. See, e.g., *United States v. Nysco Labs., Inc.*, 26 F.R.D. 159 (E.D.N.Y. 1960).

49. *Rosenow v. Macklin*, Minn. Rules Comm'n Op. No. 36, 12th Jud. Dist., 1952. The court in *Rosenow* refused to permit interrogation of a doctor defendant where the answer would require expertise, although the defendant was required to answer questions calling for a factual reply. In *Kratzer v. Minneapolis Soc'y of Fine Arts, Inc.*, Civil No. 537424, 4th Jud. Dist., Minn., Nov. 18, 1959, the court decided that a deposition could not be taken of defendant's expert in an attempt to discover his opinion, but allowed factual discovery on a showing of good cause, stating: "It is the court's conclusion that the weighing of interests and of factors of fairness under the facts claimed by the plaintiff justify the granting of his motion for the purpose, not of inquiring of Dr. Middeldorf as to his expert opinion, but of inquiring as to facts known by him upon which an opinion might be based."

clusion or opinion,<sup>50</sup> or where facts and conclusions are so intertwined as to be inseparable, Rule 26.02 would seem to demand complete protection. Yet, by allowing some discovery under the fact-conclusion distinction on a showing of good cause—the *Hickman* rule applied to the discovery of purely “facts”—much of the harshness of an otherwise absolute prohibition of conclusions would be alleviated.

Rule 26.02 could be interpreted to accord protection only to written expert conclusions while permitting their discovery by deposition or interrogatory.<sup>51</sup> It might be argued, therefore, that the absolute prohibition is inapplicable to nonwritten conclusions, and discovery by deposition, under a *Hickman*-type rule, would be permitted on a showing of good cause as in the case of an oral work-product.<sup>52</sup> Rule 26.02, however, explicitly refers to written work-

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50. What is a “conclusion” or an “ultimate conclusion” can be almost incapable of definition. Cf. *Dixon v. Sunshine Bus Lines, Inc.*, 27 F. Supp. 797 (W.D. La. 1939) (abolishes the distinction between discovery of “evidentiary” facts and “ultimate or material” facts). The federal courts have occasionally allowed discovery, however, of conclusions when they assume the nature of “ultimate facts,” e.g., *E. I. duPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959), or because there is no other way for the plaintiff to prove his case, e.g., *United States v. Nysco Labs., Inc.*, 26 F.R.D. 159 (E.D.N.Y. 1960). See also *Sunderland, Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737 (1939).

Because of the confusion that can arise, it would seem that factual discovery should be allowed only on a showing of good cause. See *Kratzer v. Minneapolis Soc’y of Fine Arts, Inc.*, Civil No. 537424, 4th Jud. Dist., Minn., Nov. 18, 1959; cf. 2 YOUNGQUIST & BLACK, MINNESOTA RULES PRACTICE (Supp. 1962, at 8), indicating that oral depositions of experts should be allowed in Minnesota on a showing of good cause.

51. This distinction is justified by finding that the exemption covers only documents, the actual prepared report, while conclusions contained in that report are not exempt. Illinois has apparently applied its exemptive provision, ILL. REV. STAT. ch. 110, § 101.19-5 (1956) only to writings. See, e.g., *Krupp v. Chicago Transit Authority*, 8 Ill. 2d 37, 42, 132 N.E.2d 532, 536 (1956). See also *Mower v. McCarthy*, 122 Utah 1, 12-14, 245 P.2d 224, 230 (1952), where the distinction was discussed. Louisiana apparently has limited the prohibition only to writings and permits discovery by deposition or interrogatory. See LA. CIV. CODE ANN. art. 1452 (West 1960); Hubert, *The New Louisiana Statute on Depositions and Discovery*, 13 LA. L. REV. 173, 193-94 (1953). Texas and Pennsylvania have cleared up the potential problem by using the term expert “information” rather than “writings.” See P.A. R. Civ. P. 4011(d); cf. Mo. R. Civ. P. 57.01(b). The use of the word “conclusions” in MINN. R. Civ. P. 26.02 could conceivably have been intended to convey the same broad meaning. Like Minnesota, Texas, Pennsylvania, Missouri and Illinois have all eliminated the good cause exception from their rules. See generally *Discovery Procedure Symposium*, 5 F.R.D. 403 (1946).

52. The good cause requirement would again be applicable because the arguments advanced to justify discovery of oral work-product on a showing

product; therefore, it is reasonable to assume that if only written conclusions were meant to be protected the provision would specifically say so.<sup>53</sup> Moreover, in *Kratzer v. Minneapolis Soc'y of Fine Arts, Inc.*,<sup>54</sup> the prohibition was applied to an attempted discovery of nonwritten conclusions. Thus, Rule 26.02 would seemingly protect expert conclusions regardless of the means of discovery employed.

## B. POSSIBLE SPECIAL CASES

In *Lyngstad v. Zarling*,<sup>55</sup> a medical malpractice case in a of good cause apply equally to discovery of expertise by deposition.

See text accompanying note 34 *supra*. But see MINN. R. Civ. P. 34, requiring "good cause" for inspection of documents. Although the Rule 34 good cause requirement, that discovery is advantageous for trial purposes, is not as severe as the *Hickman* test, discovery by deposition should probably be allowed on a *Hickman* test of necessity rather than the Rule 34 test. Also, if experts are available to both parties, the purpose of an oral deposition would apparently be only to capitalize on the adverse party's trial preparations. Thus, depositions should be allowed only when one party has the only available expert and there is no alternate means of discovering the information. Cf. *Randall v. Goodrich-Gamble Co.*, 244 Minn. 401, 70 N.W.2d 261 (1955), where the defendants did not request discovery of expert conclusions, although they could have shown good cause. The claim involved damages allegedly due to application of a certain liniment. Plaintiff's chemist tested the liniment contained in the bottle in question, but the container was then emptied and was unavailable to the defendant. See a comment on this case by Wright, *Recent Trends in the Practical Use of Discovery*, 16 NACCA L.J. 409, 415 (1955).

2 YOUNGQUIST & BLACIK, MINNESOTA RULES PRACTICE (Supp. 1962, at 8) suggests that depositions be allowed and controlled by the good cause rule, citing, to this effect, *American Oil Co. v. Pennsylvania Petroleum Prods., Co.*, 23 F.R.D. 680 (D.R.I. 1959); *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954); *Colden v. R. J. Schofield Motors*, 14 F.R.D. 521 (N.D. Ohio 1952). However, since no good cause provision exists in Minnesota, there would seem to be no reason for allowing an imposition of the good cause exception, even if desirable, by the imperfect distinction between oral and written conclusions.

53. See note 7 *supra*. The wording of the statute is rather confusing. Arguably, "conclusions" could be modified by "writings" used earlier in the rule and the work-product and expert exemption should be considered in *pari materia*. But see reference to Texas, Missouri and Pennsylvania rules note 51 *supra*.

54. Civil No. 539424, 4th Jud. Dist., Minn., Nov. 18, 1959; see note 49 *supra*. Indeed, the court faced the issue of interpretation directly and found that only work-product had to be written, stating: "The court reads the sentence with reference to the instant case as meaning that, in the taking of a deposition of the witness of an adverse party, one may not, over objection, require an expert of the adverse party to state his conclusions." (Emphasis added.)

55. Civil No. 561925, 4th Jud. Dist., Minn., Nov. 16, 1960.

Minnesota district court created a narrow exception to Rule 26.02, for the defendant doctor was required to divulge his conclusions and opinions forming the basis of his treatment. The court in reaching that determination considered the peculiar nature of a malpractice case and pointed out that in such a case the defendant's diagnosis was necessary evidence in the plaintiff's case. The *Lyngstad* case is unique because the expert was also the party defendant. Therefore, it does not represent authority for the proposition that medical expert opinions or conclusions are subject to discovery in every case. Indeed, the court examined the issue only in terms of the defendant-expert, and, more particularly, the malpractice case.<sup>56</sup> The court in *Lyngstad* did prohibit inquiries as to conclusions formed by the defendant subsequent to the alleged negligent treatment, but on the questionable ground that they would constitute an "unreasonable annoyance to the defendant within the meaning of Rule 30.02."<sup>57</sup>

A better result could be obtained by using a *Hickman* analysis rather than Rule 30.02. Since Rule 26.02, as interpreted in *Lyngstad*, does not protect the conclusions of an expert-defendant in a malpractice case, *Hickman* should control and good cause could be shown to permit discovery of conclusions relevant to the alleged negligent act. Although expert conclusions as to subsequent treatment might ordinarily be established by other expert witnesses, it might be possible for one party to tie up all available experts in a community. If the *Hickman* rationale were used, good cause might be shown to permit discovery, while the blanket prohibition of *Lyngstad* based on Rule 30.02 would seemingly apply to all conclusions formed after the alleged negligent act.

Some federal courts have held that the rule limiting discovery should be applied narrowly to protect only experts engaged by a party specifically for the purpose of the impending litigation.<sup>58</sup> Thus, the conclusions of court-appointed experts and experts who

56. See Civil No. 561925, 4th Jud. Dist., Minn., Nov. 16, 1960, p. M-3.

57. *Id.* at M-4. The court was concerned with lengthy hypothetical questions being propounded to the defendant doctor resulting in harassment that would result in either frequent hearings on the propriety of the questions or a referee sitting in on the deposition process. Cf. *Beirne v. Fitch Sanitarium, Inc.*, 20 F.R.D. 93 (S.D.N.Y. 1957); *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931). Procuring a Rule 30.02 order may not, however, be to the liking of a harassed deponent. See *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 983 (1961).

58. See, e.g., *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594, 596 (W.D. Pa. 1947): "Where an individual is an expert in a given field, and, therefore, qualified to submit an opinion, [he may be examined and asked] why certain things were done or not done by [him] where said person is . . . employed regularly by the adverse party . . ." See also *Russo v. Merck*



are concurrently permanent employees of a party to the action would be subject to discovery. The employee-expert, however, presents a situation analogous to malpractice cases, in which strict adherence to a policy promoting an efficient adversary system would preclude discovery of the conclusions of the employee-expert formed subsequent to the act giving rise to the litigation, reports issued at the request of an attorney, or other conclusions prepared in anticipation of litigation.<sup>59</sup> But discovery ought to be permitted where the party is unable to prepare his case adequately without the conclusions of the employee-expert or where his adversary has a virtual monopoly on the experts in the community<sup>60</sup> — a *Hickman*-type rule.

While there are situations in which the conclusions of an expert are discoverable under Rule 26.02, courts should be wary of creating exceptions to the extent that the rationale for permitting discovery is no longer applicable. In *Luger v. Linner*,<sup>61</sup> for instance, a Minnesota district court in another malpractice case went beyond *Lyngstad* and ordered production not only of the diagnosis prior to the alleged malpractice, but also opinion testimony about the knowledge of other physicians in the community and the techniques and practices employed by them.<sup>62</sup> The court reasoned that such knowledge is "an integral part of a physician's work in connection with the care and treatment of a particular pa-

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& Co., Inc., 21 F.R.D. 237 (D.R.I. 1957); *Kendall v. United Air Lines, Inc.*, 9 F.R.D. 702 (S.D.N.Y. 1949).

59. A further complication arises in that reports by an employee-expert could conceivably be privileged. See Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 958-66 (1956); cf. *Schmitt v. Emery*, 211 Minn. 547, 2 N.W.2d 413 (1942). The report might also be found to be work-product. These determinations turn on the interpretation of the word "agent" in Rule 26.02 and the extent to which the attorney-client privilege covers communications by a party's employee or agent. Although *Brown v. Saint Paul City Ry.*, 241 Minn. 15, 62 N.W.2d 688 (1954) might eliminate the possibility of these contentions, the difficulty inhering in an attempt to discover the expert conclusions of an employee could be thrice compounded.

60. Cf. *Kratzer v. Minneapolis Soc'y of Fine Arts, Inc.*, Civil No. 537424, 4th Jud. Dist., Minn., Nov. 18, 1959, where plaintiff asserted that the expert whose deposition he wished was not the only authority, but that authorities were few and that all of them were employed by the defendant.

61. Civil No. 554251, 4th Jud. Dist., Minn., March 25, 1963.

62. The defendant was asked on cross-examination whether "according to medical standards a general practitioner is supposed to know what a fracture is, is he." An objection interposed to the question as calling for a medical opinion was sustained. A new trial was ordered by the court, however, on the ground that this evidence should properly have been received. Although the question arose under Rule 43.02 relating to cross-examination rather than on deposition, the basic considerations are the same.

tient.”<sup>63</sup> The result reached in *Linner*, therefore, allowed examination of the defendant-expert as an expert per se. In doing so the court exceeded the bounds of any permissible exception to the prohibition expressed by Rule 26.02 or even to the *Hickman* rule because other experts could have provided this information.

### CONCLUSION

The future of the work-product exclusionary clause of Rule 26.02 depends on the use made of Rule 30.02 protective orders, the scope of the usual course of business exception, and the breadth of the definition given “writings,” as well as the applicability of a *Hickman*-type “good cause” exception. Conceivably, the rule could be severely limited by judicially created exceptions. Nonetheless, certain material, such as written statements of witnesses taken by an attorney, clearly cannot be compelled. With controversial, borderline material, however, the trend seems to be toward broad discoverability, in accordance with federal procedure under *Hickman*. Such a development is desirable if it does not violate express provisions of Rule 26.02, because protection may be afforded by both the *Hickman* good cause exception and the discretionary Rule 30.02.

Judicially created exceptions have been even more common with respect to the rule protecting the conclusions of an expert. The expert does not share the peculiar position of an attorney as an advocate in an adversary proceeding. Therefore, these exceptions are perhaps justified as a means of maximizing discovery without detriment to the adversary system. Because of the discretionary powers given to the courts under Rule 30.02, the protection given expert conclusions could, perhaps justifiably, be all but eliminated by a determination that while written reports are protected, an oral deposition may be taken of an adverse party’s expert on a showing of good cause.<sup>64</sup>

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63. Civil No. 554251, 4th Jud. Dist., Minn., March 25, 1963, at 2.

64. Cf. YOUNGQUIST & BLAIR, 2 MINNESOTA RULES PRACTICE (Supp. 1962, at 8).

